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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LEE FARRIS EZELL, JR., Defendant and Appellant.	B299601 (Los Angeles County Super. Ct. No. PA040672)

APPEAL from a judgment of the Superior Court for Los Angeles County, Michael Terrell, Judge. Affirmed.

Christopher Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Kristen Inberg and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Lee Farris Ezell, Jr., who was convicted of first degree murder, appeals from the denial of his petition for resentencing under Penal Code[1] section 1170.95. Without appointing counsel for defendant and without defendant present (but after having received briefing from the prosecutor, and with the prosecutor present), the trial court denied the petition on the ground that defendant was not eligible for resentencing as a matter of law. Defendant contends the trial court erred by finding he had not made a prima facie showing under section 1170.95 and that the court violated his state and federal constitutional right to the assistance of counsel by denying his petition without appointing counsel for him and without giving that counsel an opportunity to file additional briefing. We conclude there was no error or constitutional violation, and affirm the judgment.

BACKGROUND

Our summary of the background regarding the murder and defendant's conviction is based upon our opinion affirming defendant's conviction, *People v. Ezell* [nonpub. opn., filed July 24, 2003], case No. B163761, 2003 Cal.App.Unpub.LEXIS 7145 (*Ezell I*).

A. *The Murder and Conviction*

Marcario Alcorn, a member of the Whitsett Avenue Crips, was attending a party on February 10, 2002, at a house in territory claimed by a rival Blood gang. Sodany Seng, a 16-year-old young woman also

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[1] Further undesignated statutory references are to the Penal Code.

was at the party. (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at p. *2.) Defendant, who was associated with the Pacoima Piru Blood gang, came to pick Seng up from the party; he was in a car owned and driven by Jamar Price. (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at p. *2.)

Alcorn and Seng walked up to the car. According to Seng, Alcorn and defendant (who had attended the same high school) conversed calmly. Seng heard defendant say something about Alcorn not remembering him, and Alcorn responding, "I know, dude. I know, dude"; Alcorn then walked away. (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at pp. *2-*3.) Seng noticed that defendant had a gun on his lap, and asked, "What the hell you brought that for?" (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at p. *2.)

Seng talked to defendant about picking up her friend and going to a club. She went back into the house to get her shoes and call her friend. (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at p. *3.) She came back out around 10 minutes later. Alcorn's car, which had been parked in front of Price's car, was gone. Defendant told her that he had "some business to take care of" and would talk to her later, then he and Price drove off. (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at p. *3.)

A short time later, some guests left the party. As they were driving away, they saw Alcorn's car crashed into a nearby fence. There were several bullet holes in the car, and the driver's side window was shattered. Alcorn had been shot in the head and the back of his

shoulder; he died from those wounds. (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at p. *3.) The gun used to shoot Alcorn, which Seng identified as the one she had seen in defendant's lap, was found hidden in a bush behind Price's home. (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at p. *3.)

Defendant was arrested, and ultimately told police that he had shot Alcorn after Alcorn threatened to kill defendant and Price; defendant said that Alcorn pointed a gun at them. (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at p. *4.) Defendant was charged with one count of murder, with allegations that the murder was committed to benefit a gang (§ 186.22, subd. (b)(1)) and that defendant personally used a firearm (§ 12022.53). A jury found defendant guilty of first degree murder, and found the allegations to be true. The trial court sentenced defendant to a term of 60 years to life in prison. (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at p. *4.)

B. *The Appeal From the Conviction*

In his appeal from the judgment, defendant raised two issues, one of which is relevant to this appeal. That argument was premised on defendant's assertion that he was convicted under a felony murder theory because he was found guilty of first degree murder under section 189. In rejecting his argument, we observed that section 189 sets forth three categories of first degree murder: "'Section 189 . . . first establishes a category of first degree murder consisting of various types of premeditated killings, and specifies certain circumstances . . . which are deemed the equivalent of premeditation. Section 189 secondly

establishes a category of first degree murders [consisting of] murders perpetrated during felonies or attempted felonies . . . . Finally, section 189 establishes a third category consisting of only one item, intentional murder by shooting out of a vehicle with intent to kill.'" (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at pp. *5-*6, quoting *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 163-164.)

We observed that "[o]nly two of these theories—drive-by shooting and premeditated murder—were presented to the jury in our case. . . . [¶] The prosecutor never argued that a drive-by shooting was first degree felony murder. He did argue that if the jury did not find that [defendant] committed the crime during a drive-by, and did not premeditate and deliberate, then it could find him guilty of second degree murder. He then explained that the easiest theory under second degree murder would be second degree felony murder, based on shooting into an occupied motor vehicle and killing a person." (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at pp. *6-*7.)

We also noted that the jury instructions were free of "any implication that the first degree murder theory based on a drive-by shooting was felony murder." (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at p. *8.) Instead, "[t]he jury was instructed that murder is divided into two degrees, and was given two theories of first degree murder: deliberate and premeditated killing, and drive-by shooting—murder which is perpetrated by means of discharging a firearm from a motor vehicle intentionally at another person outside the vehicle when the perpetrator specifically intended to

inflict death." (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at p. *8.)

We affirmed the conviction. (*Ezell I*, *supra*, 2003 Cal.App.Unpub.LEXIS 7145, at p. *14.)

C. *The Petition for Resentencing*

On February 28, 2019, defendant filed a form petition for resentencing under section 1170.95. The form petition has several boxes the petitioner may (or must) check. Among the boxes defendant checked were boxes indicating that his murder conviction was based upon the felony murder rule or the natural and probable consequences doctrine, that he could not now be convicted of murder due to changes made to sections 188 and 189, and that he requested that counsel be appointed for him "during this re-sentencing process."

The prosecutor filed an opposition to defendant's petition on April 12, 2019. Most of that opposition consisted of arguments (and documents supporting those arguments) as to why section 1170.95 is unconstitutional. The opposition also included a page and a half of argument regarding the inapplicability of section 1170.95 to defendant's conviction: it argued that defendant was not eligible for resentencing because he was not convicted under a felony murder theory or the natural and probable consequences doctrine, and because he was the actual killer. The prosecution attached our decision in *Ezell I* in support of those arguments.

On April 22, 2019, the trial court called the matter as a non-appearance matter. Neither defendant nor counsel was present;

although the prosecutor was present, she did not argue. The court stated it had reviewed the petition and the opposition, and that it was not going to grant a hearing "because it's clear to the court that the defendant has failed to state a prima facie case." The court noted that defendant was the actual killer and was not convicted under a felony murder theory. Therefore, the court found he is ineligible for resentencing as a matter of law. Defendant timely appealed from the order denying his petition.

DISCUSSION

A. *Amendment of the Felony Murder Rule*

On January 1, 2019, California's felony murder rule and the natural and probable consequences doctrine were altered by Senate Bill No. 1437 (S.B. 1437). S.B. 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) It accomplished this purpose by amending section 188, defining malice, and section 189, defining the degrees of murder.

In amending section 188, S.B. 1437 added the following provision: "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3); Stats. 2018, ch.

1015, § 2.) S.B. 1437 also added the following as subdivision (e) of section 189: "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a)[2] in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (§ 189, subd. (e); Stats. 2018, ch. 1015, § 3.)

B. *Petitions Under Section 1170.95*

In addition to amending the felony murder rule and the natural and probable consequences doctrine, S.B. 1437 also added section 1170.95. (Stats. 2018, ch. 1015, § 4.) That statute allows a person convicted of felony murder, or murder under the natural and probable consequences doctrine, to "file a petition with the court that sentenced

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[2] Subdivision (a) of section 189 provides: "All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 287, 288, or 289, or former Section 288a, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree."

the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply: [¶] (1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial. . . . [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189." (§ 1170.95, subd. (a).)

Subdivision (b)(1) of section 1170.95 requires that the petition be filed with the court that sentenced the petitioner, and must include (a) a declaration by the petitioner that he or she is eligible for relief under the section; (b) the superior court case number and year of conviction; and (c) whether the petitioner requests appointment of counsel. Subdivision (b)(2) provides that the trial court may deny the petition without prejudice if any of the information required by subdivision (b)(1) is missing and cannot be readily ascertained by the court. (§ 1170.95, subd. (b)(2).)

Subdivision (c)—the provision at issue in this appeal—provides: "The court shall review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of this section. If the petitioner has requested counsel, the court shall appoint counsel to represent the petitioner. The prosecutor shall file and serve a response within 60 days of service of the petition and the petitioner may file and serve a reply within 30 days after the prosecutor response is served. These deadlines shall be extended for

good cause. If the petitioner makes a prima facie showing that he or she is entitled to relief, the court shall issue an order to show cause." (§ 1170.95, subd. (c).)

The remainder of the statute sets forth the procedure for responding to, and the hearing on, the order to show cause, as well as post-hearing matters.

C. *Defendant's Contentions*

Defendant contends that his petition made a prima facie showing that he is entitled to relief, and that the trial court's summary denial of the petition violated his federal and state constitutional right to the assistance of counsel. We conclude the trial court correctly found that defendant is not eligible for relief as a matter of law. We also find there was no violation of defendant's constitutional rights, but even if there was, any such error was harmless.

1. *Defendant Failed to Make a Prima Facie Showing That He Is Entitled to Relief*

Citing *In re Taylor* (2019) 34 Cal.App.5th 543 (*Taylor*), defendant contends that his declaration—stating that all three requirements set forth in section 1170.95, subdivision (a), were met—establishes a prima facie showing that he falls within the provisions of the statute, and therefore he was entitled to appointed counsel. We disagree.

The issue of what a trial court may consider in determining whether a defendant has made a prima facie showing of eligibility for resentencing has been addressed by several courts and is currently

before our Supreme Court. (*People v. Lewis* (2020) 43 Cal.App.5th 1128, 1137-1140 (*Lewis*), rev. granted, S260598, March 18, 2020; *People v. Cornelius* (2020) 44 Cal.App.5th 54, 58 (*Cornelius*), rev. granted, S260410, March 18, 2020; *People v. Verdugo* (2020) 44 Cal.App.5th 320 (*Verdugo*), rev. granted, S260493, March 18, 2020.) We find the analysis in *Verdugo* particularly persuasive. As that court explained, "the relevant statutory language, viewed in context, makes plain the Legislature's intent to permit the sentencing court, before counsel must be appointed, to examine readily available portions of the record of conviction to determine whether a prima facie showing has been made that the petitioner falls within the provisions of section 1170.95—that is, a prima facie showing the petitioner may be eligible for relief because he or she could not be convicted of first or second degree murder following the changes made by [S.B.] 1437 to the definition of murder in sections 188 and 189." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 323; see also *Lewis*, *supra*, 43 Cal.App.5th at pp. 1137-1140; *Cornelius*, *supra*, 44 Cal.App.5th at p. 58.)

In reaching this conclusion, the *Verdugo* court noted that subdivision (b)(2) of section 1170.95 provides for an initial review to determine the facial sufficiency of the petition, while subdivision (c) "then prescribes two additional court reviews before an order to show cause may issue." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 328.) The first of those is "made before any briefing to determine whether the petitioner has made a prima facie showing he or she falls within section 1170.95—that is, that the petitioner may be eligible for relief—and a

second after briefing by both sides to determine whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Ibid.*)

The court observed that the first prima facie review of the petition under subdivision (c) of section 1170.95 "must be something more than simply determining whether the petition is facially sufficient; otherwise given subdivision (b)(2), this portion of subdivision (c) would be surplusage." (*Verdugo*, *supra*, 44 Cal.App.5th at pp. 328-329.) But the court noted that "the prebriefing determination whether the petitioner has made a prima facie showing he or she 'falls within the provisions of this section' must also be different from the postbriefing prima facie showing the petitioner 'is entitled to relief,' required for issuance of an order to show cause, if only in the nature and extent of materials properly presented to the court in connection with the second prima facie step, or else the two prima facie showings specified in subdivision (c) would be redundant." (*Id.* at p. 329.) The court concluded that "[t]he midpoint between section 1170.95, subdivision (b)(2)'s initial finding the petition is facially sufficient and subdivision (c)'s second prima facie showing the petitioner is entitled to relief is a preliminary review of statutory eligibility for resentencing, a concept that is a well-established part of the resentencing process under Propositions 36 and 47. [Citations.] The court's role at this stage is simply to decide whether the petitioner is ineligible for relief as a matter of law, making all factual inferences in favor of the petitioner." (*Ibid.*)

Addressing the process by which the court is to conduct the first review under section 1170.95, subdivision (c), the *Verdugo* court found that "subdivisions (a) and (b) of section 1170.95 provide a clear

indication of the Legislature's intent. As discussed, subdivision (b)(2) directs the court in considering the facial sufficiency of the petition to access readily ascertainable information. The same material that may be evaluated under subdivision (b)(2)—that is, documents in the court file or otherwise part of the record of conviction that are readily ascertainable—should similarly be available to the court in connection with the first prima facie determination required by subdivision (c). . . . Based on a threshold review of these documents, the court can dismiss any petition filed by an individual who was not actually convicted of first or second degree murder. The record of conviction might also include other information that establishes the petitioner is ineligible for relief as a matter of law because he or she was convicted on a ground that remains valid notwithstanding [S.B.] 1437's amendments to sections 188 and 189 . . . . [¶] Because the court is only evaluating whether there is a prima facie showing the petitioner falls within the provisions of the statute, however, if the petitioner's ineligibility for resentencing under section 1170.95 is not established as a matter of law by the record of conviction, the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties' briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Verdugo, supra*, 44 Cal.App.5th at pp. 329-330.)

With regard to the timing of the appointment of counsel for defendant, the *Verdugo* court found that "[t]he structure and grammar of [subdivision (c) of section 1170.95] indicate the Legislature intended

to create a chronological sequence: first, a prima facie showing [the first sentence of the subdivision]; thereafter, appointment of counsel for petitioner [the second sentence]; then, briefing by the parties [the third sentence]." (*Verdugo*, *supra*, 44 Cal.App.5th at p. 332.) The court noted that it would not "make sense as a practical matter to appoint counsel earlier in the process since counsel's first task is to reply to the prosecutor's response to the petition. If, as here, the court concludes the petitioner has failed to make the initial prima facie showing required by subdivision (c), counsel need not be appointed. Of course, if the petitioner appeals the superior court's summary denial of a resentencing petition, appointed counsel on appeal can argue the court erred in concluding his or her client was ineligible for relief as a matter of law." (*Id.* at pp. 332-333.)

We agree with the *Verdugo* court's analysis. Defendant argues in his appellant's reply brief, however, that two subsequent decisions from other appellate courts (*People v. Torres* (2020) 46 Cal.App.5th 1168 (rev. granted, S262011, June 24, 2020) (*Torres*) and *People v. Drayton* (2020) 47 Cal.App.5th 965 (*Drayton*))—as well as *Taylor*, the case defendant relied upon in his opening brief—"contradict the holdings" of *Verdugo*, *Lewis*, and *Cornelius*. We see no such contradiction.

For example, *Taylor* did not involve a section 1170.95 petition; it involved a petition for writ of habeas corpus seeking to have a special circumstances finding vacated. (*Taylor*, *supra*, 34 Cal.App.5th at p. 546.) Indeed, Taylor's habeas petition was filed before S.B. 1437 took effect. (*Id.* at p. 562.) In addressing Taylor's request that the court

vacate his felony murder conviction under S.B. 1437, the court gave a very short summary of section 1170.95, describing subdivision (c) in a single sentence: "Upon receiving a petition that is supported by the petitioner's declaration that all three conditions are met and that makes a 'prima facie showing that the petitioner falls within the provisions of [section 1170.95],' the sentencing court must issue an order to show cause." (*Taylor*, *supra*, 34 Cal.App.5th at p. 562.) However, the court declined to rule on Taylor's request, and therefore—unlike the *Verdugo* court—had no cause to examine the appropriate procedure for ruling on a section 1170.95 petition.

In *Drayton*, the appellate court expressly declined to render any opinion regarding the holdings in *Verdugo*, *Lewis*, and *Cornelius* that the trial court may substantively review documents from the record of conviction when assessing the petition's prima facie showing of eligibility, because there was no dispute in the case before it that Drayton made a prima facie showing of eligibility. (*Drayton*, *supra*, 47 Cal.App.5th at p. 976, fn. 6.) Nevertheless, the court held that when assessing a defendant's prima facie showing in a section 1170.95 petition, the trial court "need not credit factual assertions that are untrue as a matter of law," and it can determine without a hearing that the defendant is not eligible for resentencing so long as that determination is based upon readily ascertainable facts from the record. (*Id.* at p. 980.) In the case before it, however, the appellate court found no such determination was possible because there had been no prior finding by a factfinder or admission by Drayton that he had been a

major participant in the underlying felony who acted with reckless indifference to human life. (*Id.* at pp. 981-982.)

Finally, in *Torres*, the appellate court expressly agreed with the *Verdugo* court's analysis and rejected Torres's argument that his submission of a facially sufficient petition entitled him to appointment of counsel and briefing. (*Torres*, *supra*, 46 Cal.App.5th at p. 1177.) However, the court held that trial court erred in summarily ruling, based upon the jury's special circumstances findings, that Torres failed to make a prima facie showing because "the jury's findings alone do not render Torres ineligible for relief." (*Id.* at p. 1178.) This holding is consistent with the *Verdugo* court's holding that "if the petitioner's ineligibility for resentencing under section 1170.95 is not established as a matter of law by the record of conviction, the court must direct the prosecutor to file a response to the petition, permit the petitioner (through appointed counsel if requested) to file a reply and then determine, with the benefit of the parties' briefing and analysis, whether the petitioner has made a prima facie showing he or she is entitled to relief." (*Verdugo, supra*, 44 Cal.App.5th at p. 330.)

Defendant contends that, as in *Torres* and *Drayton*, the record here does not show that he is ineligible for resentencing under section 1170.95. He argues there was no forensic evidence showing that he (rather than Price, the driver of the car he was in) fired the fatal shot, the evidence of his confession does not conclusively prove that he was the actual killer, the record before the trial court did not include the abstract of judgment or the trial court's minutes showing which

subdivision of section 12022.53 the jury found to be true (i.e., whether it found that he personally discharged a firearm causing death), and it is possible he was convicted as an aider and abettor. What defendant ignores is that section 1170.95 provides for resentencing only for "[a] person convicted of felony murder or murder under a natural and probable consequences theory" (§ 1170.95, subd. (a)), and in our decision affirming his first degree murder conviction we held that defendant was *not* convicted under a felony murder theory but was instead convicted under a premeditated murder or a drive-by shooting (i.e., intentional murder by shooting out of vehicle with the intent to kill) theory. Therefore, the trial court in this case correctly found that defendant is ineligible for resentencing under section 1170.95 as a matter of law.

2. *Asserted Constitutional Error*

Defendant asserts the trial court's summary denial of his petition without appointing him counsel violated his federal and state constitutional right to the assistance of counsel. He is mistaken.

Defendant contends the determination whether his petition states a prima facie case for relief is a critical stage of the criminal proceeding, for which the Sixth Amendment to the United States Constitution and article I, section 15 of the California Constitution guarantee defendant the right to counsel. But as our Supreme Court explained, proceedings under a statutory enactment that entitles an inmate to petition for resentencing to reduce, recall, or vacate a sentence do not implicate the Sixth Amendment, because a finding that the inmate is not eligible for resentencing "does not increase the petitioner's sentence; it simply

leaves the original sentence intact." (*People v. Perez* (2018) 4 Cal.5th 1055, 1064; see also *Dillon v. United States* (2010) 560 U.S. 817, 828-829.)

For the same reason, these proceedings do not implicate article I, section 15 of the California Constitution, despite its more expansive scope. Under our state constitution, a criminal defendant's right to counsel extends to "critical" stages of the criminal process, which "can be understood as those events or proceedings in which the accused is brought in confrontation with the state, where potential substantial prejudice to the accused's rights inheres in the confrontation, and where counsel's assistance can help to avoid that prejudice." (*Gardner v. Appellate Division of Superior Court* (2019) 6 Cal.5th 998, 1004-1005.) But a proceeding initiated by a criminal defendant who has been convicted and sentenced, in which the court must determine whether the record of conviction shows that the convicted defendant may be eligible for a sentence reduction is not a proceeding that subjects an "accused" to potential substantial prejudice to his or her rights. Thus, the summary denial of a section 1170.95 without the appointment of counsel does not violate the California Constitution.

3. *Other Arguments*

Defendant makes two additional arguments that can be addressed briefly. First, defendant argues he had a statutory right to file a reply brief after the prosecutor filed an opposition to his petition. Second, he contends, in effect, that the trial court erred by allowing the prosecutor to file an opposition to his petition and by holding a hearing at which

only the prosecutor was present. Even if we were to assume error with regard to either argument, any such error was harmless under any standard because our opinion in *Ezell I* establishes that defendant was not convicted under a felony murder theory, and thus he is ineligible for resentencing under section 1170.95 as a matter of law.

DISPOSITION

The order denying defendant's section 1170.95 petition is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

CURREY, J.